

209 CMR 40.00: UNFAIR AND DECEPTIVE PRACTICES IN CONSUMER TRANSACTIONS

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40.01: Authority, Purpose, and Scope

- (1) Authority. 209 CMR 40.00 is issued pursuant to M.G.L. c. 167, § 2A and M.G.L. c. 183C.
- (2) Purpose. Unfair or deceptive acts or practices in or affecting consumer transactions are unlawful under M.G.L. c. 167, § 2A. In addition, predatory home loan practices are prohibited under M.G.L. c. 183C.
- (3) Scope. 209 CMR 40.00 applies to any bank, any Massachusetts or out-of-state branch, any association or corporation chartered and authorized to do a banking business by a state of the United States other than the Commonwealth, by the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or by a country other than the United States, or a national banking association, federal savings and loan association, federal savings bank or federal credit union, which has its main office located in the Commonwealth or in any other jurisdiction named herein. 209 CMR 40.00 also applies to any lender.

40.02: Definitions

For the purposes of 209 CMR 40.00, the following definitions apply:

Affiliate, means any company that controls, is controlled by, or is under common control with another company. Control shall mean ownership of 10% or more of any class of outstanding capital stock of the company or the power to direct or cause the direction of the management and policies of the company.

Annual Percentage Rate, means the annual percentage rate for a loan calculated according to the Federal Truth In Lending Act (15 U.S.C. 1601 et seq.) and 12 CFR 226, 209 CMR 32.14 or 209 CMR 32.22, as applicable.

Bank, any association or corporation chartered by the Commonwealth under the provisions of M.G.L. c. 168, 170, 171, or 172 or any individuals, association, partnership or corporation incorporated or doing a banking business in the Commonwealth, subject to the supervision of the Commissioner.

Benchmark Rate, the interest rate which the borrower can reduce by paying bona fide discount points; this rate shall not exceed the weekly average yield of United States Treasury securities having a maturity of 5 years, on the fifteenth day of the month immediately preceding the month in which the loan was made, plus 4 percentage points.

Bona Fide Loan Discount Points, means loan discount points, which are:

- (a) knowingly paid by the borrower;
- (b) paid for the express purpose of lowering the benchmark rate; and
- (c) in fact reducing the interest rate or time-price differential applicable to the loan from an interest rate which does not exceed the benchmark rate.

Broker, means any person who for compensation directly or indirectly solicits, processes, places or negotiates home mortgage loans for others or who closes home mortgage loans which may be in the person's own name with the funds provided by others and which loans are thereafter assigned to the person providing the funding of the loans; provided, that broker shall not include a person who is an attorney providing legal services in association with the closing of a home mortgage loan who is not also funding the home loan and is not an affiliate of the lender.

Commissioner, means the commissioner of banks.

Consumer, means a natural person who seeks or acquires goods, services, or money for personal, family, or household use other than for the purchase of real property.

Consumer Transaction, means a transaction between a lender and a consumer, in which the money, property or services are primarily for personal, family or household purposes.

Conventional Mortgage Rate, means the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, as of the applicable time set forth in 209 CMR 40.02: High Cost Home Loan (a)(1).

Conventional Prepayment Penalty, means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law provided the home loan:

- (a) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than 2 percentage points, and
- (b) does not permit any prepayment fees or penalties that exceed 2 per cent of the amount prepaid.

Cosigner, means

- (a) a natural person who assumes liability for the obligation of a consumer without receiving goods, services, or money in return for the obligation, or, in the case of an open-end credit obligation, without receiving the contractual right to obtain extensions of credit under the account.
- (b) Cosigner includes any person whose signature is requested as a condition to granting credit to a consumer, or as a condition for forbearance on collection of a consumer's obligation that is in default. The term does not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to state law.
- (c) A person who meets the definition in 209 CMR 40.02: Cosigner, is a cosigner whether

or not the person is designated as such on the credit obligation.

Earnings, means compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

Federal Bank, means a national banking association, savings and loan association or savings bank which exists by authority of the United States, the main office of which is located in the Commonwealth.

Federal Branch, means a branch in the Commonwealth of any out-of-state federal bank.

Federal Credit Union, means a credit union organized under the provisions of the Federal Credit Union Act.

Financial Institution, means a bank, a federal bank, a Massachusetts branch, a federal branch, an out-of-state branch, or a federal credit union.

High Cost Home Loan, means:

- (a) a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:
 - 1. a. The annual percentage rate at consummation will exceed by more than eight percentage points for first-lien loans, or by more than nine percentage points for subordinate-lien loans, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the lender;
 - b. When calculating the annual percentage rate for adjustable rate loans, the lender shall use the interest rate that would be effective once the introductory rate has expired; or
 - 2. Excluding either a conventional prepayment penalty or up to 2 bona fide discount points, the total points and fees payable by the consumer at or before loan closing will exceed the greater of 5 per cent of the total loan amount or \$400; the \$400 figure shall be adjusted annually by the Commissioner on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1st.¹
- (b) a high cost home loan does not include the following:
 - 1. a reverse-mortgage transaction subject to 209 CMR 32.33 or 12 CFR 226.33.
 - 2. an unsecured open-end credit plan subject to 209 CMR 32.00 or Subpart B of 12 CFR 226.00.

Lender, means an entity that originated 5 or more home mortgage loans within the past 12 month period or acted as an intermediary between originators and borrowers on 5 or more home mortgage loans within the past 12 month period, provided that lender shall not include a person who is an attorney providing legal services in association with the closing of a home loan who is not also funding the home loan and is not an affiliate of the lender. For purposes of 209 CMR 40.00, lender shall include broker and financial institution.

¹ As of January 1, 2005, the adjusted figure was \$510.

Massachusetts Bank, means any bank, other than an association or corporation chartered pursuant to M.G.L. c. 171.

Massachusetts Branch, means a branch in the Commonwealth of any out-of-state bank.

Obligation, means an agreement between a consumer and a lender.

Obligor, means a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan.

Out-of-state Bank, means any association or corporation authorized to do a banking business the main office of which is located outside the Commonwealth and which exists by authority of any state of the United States other than the Commonwealth.

Out-of-state Branch, means a branch of any Massachusetts bank located outside the Commonwealth.

Out-of-state Federal Bank, means a national banking association, savings and loan association or savings bank which exists by authority of the United States the main office of which is located outside the Commonwealth.

Person, means an individual, corporation, or other business organization.

Points and Fees, means:

(a) For closed end loans:

1. all items required to be disclosed under 12 CFR 226.4 (a) and 226.4 (b) or 209 CMR 32.04(1) and 209 CMR 32.04(2), except interest or the time-price differential;
2. charges for items listed under sections 226.4(c)(7) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(3)(g) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor;
3. the maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents;
4. all prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same lender;
5. all compensation paid directly or indirectly to a mortgage broker, not otherwise included in 209 CMR 40.02: Points and Fees (a)(1) and (2);
6. the cost of all premiums financed by the lender, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the lender directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the lender; and
7. Points and fees shall not include the following:
 - a. taxes, filing fees, recording and other charges and fees paid to or to be paid to a public official for determining the existence of or for perfecting, releasing or satisfying a security interest; and

b. fees paid to a person other than a lender or to the mortgage broker for the following: fees for flood certification; fees for pest infestation; fees for flood determination; appraisal fees; fees for inspections performed before closing; credit reports; surveys; notary fees; escrow charges so long as not otherwise included under 209 CMR 40.02: Points and Fees (1); title insurance premiums; and fire insurance and flood insurance premiums, including homeowner premiums, if the conditions in sections 12 CFR 226.4(d)(2) or 209 CMR 32.04(4)(b), as amended from time to time, are met.

(b) For open-end loans, the points and fees shall be calculated by adding the total points and fees included within 209 CMR 40.02: Points and Fees (a), plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

Scheduled Monthly Payments, means minimum sums required to be paid with respect to all of the borrower's debts that are reported on any loan application completed by the borrower and a nationally recognized consumer credit bureau report and the monthly mortgage payment due under the high cost home loan (ignoring any reduction arising from a lower introductory rate) plus 1/12 of the annualized cost of real estate tax and insurance premium payments during the immediately preceding 12 months. Scheduled monthly payments shall not include any debts that are consolidated with or paid off by the high cost home loan.

Total loan amount, means the total amount the consumer will borrow, as reflected by the face amount of the note.

40.03: Violations of Truth in Lending

It is an unfair act or practice for a lender subject to 209 CMR 32.00 *et seq.* to make a high cost home loan in violation of 209 CMR 32.32 or 209 CMR 32.34.

40.04: High Cost Home Loan Disclosures

It is an unfair act or practice for a lender, except a lender subject to 209 CMR 40.03, other than a broker, to fail to disclose any of the following in conspicuous type size in a high cost home loan transaction:

(1) Notices. The following statement: "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan."

(2) Annual Percentage Rate. The annual percentage rate calculated in accordance with 209 CMR 32.14 or 209 CMR 32.22, as applicable.

(3) Regular Payment; Balloon Payment. The amount of the regular monthly (or other periodic) payment and the amount of any balloon payment. The regular payment disclosed under 209 CMR 40.04(3) shall be treated as accurate if it is based on an amount borrowed that is deemed accurate and is disclosed under 209 CMR 40.04(5).

(4) Variable Rate. For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the

maximum interest rate required to be disclosed under 209 CMR 32.30.

(5) Amount Borrowed. For a mortgage refinancing, the total amount the consumer will borrow, as reflected by the face amount of the note; and where the amount borrowed includes premiums or other charges for optional credit insurance or debt-cancellation coverage, that fact shall be stated, grouped together with the disclosure of the amount borrowed. The disclosure of the amount borrowed shall be treated as accurate if it is not more than \$100 above or below the amount required to be disclosed.

(6) Application.

(a) The following statement must appear in at least 12 point type directly above the borrower's signature line on the application: "The loan which will be offered to you is not necessarily the least expensive loan available to you and you are advised to shop around to determine competitive interest rates, points, and other fees and charges." In the event that the lender does not know whether the borrower's application is a high cost home loan application, such disclosure must be made as soon as the lender determines that it is a high cost home loan application, but in any event, no later than 24 hours after such determination is made.

(b) At or prior to taking an application, a lender must also deliver, place in the mail, fax or electronically transmit to the borrower a statement in substantially the following form: "Although your aggregate monthly debt payment may decrease, the high cost home loan may increase both:

1. your aggregate number of monthly debt payments; and
2. the aggregate amount paid by you over the term of the high cost home loan if such are likely the case.

The disclosure in 209 CMR 40.04(6)(b) may be combined with disclosures required under M.G.L. c. 184, § 17D. In the event that the lender does not know whether the borrower's application is a high cost home loan application, such disclosure must be made as soon as the lender determines that it is a high cost home loan application, but in any event, no later than 24 hours after such determination is made.

40.05: High Cost Home Loan Limitations

It is an unfair act or practice for a lender, except a lender subject to 209 CMR 40.03, to extend a high cost home loan that provides for any of the following terms:

(1) (a) Balloon Payment. A scheduled payment that is more than twice as large as the average of earlier scheduled payments.

(b) Exception. The limitations in 209 CMR 40.05(1)(a) do not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

(2) Negative Amortization. A payment schedule with regular periodic payments that cause the principal balance to increase.

(3) Advance Payments. A payment schedule that consolidates more than two periodic payments and pays them in advance from the proceeds.

(4) Increased Interest Rate. An increase in the interest rate after default. This shall not apply to interest rate changes in a variable rate loan otherwise consistent with the home loan documents

provided that the change in the interest rate is not triggered by the event of default or the acceleration of indebtedness.

(5) Rebates. A refund calculated by a method less favorable than the actuarial method (as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 USC 1615(d)), for rebates of interest arising from a loan acceleration due to default.

(6) Prepayment Penalties. A penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992.

(7) Due-on-demand Clause. A demand feature that permits the lender to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

- (a) There is fraud or material misrepresentation by the consumer in connection with the loan that is not induced by the lender, its employees, or agents;
- (b) The consumer fails to meet the repayment terms of the agreement for any outstanding balance and after the consumer has been contacted in writing and afforded a reasonable opportunity to meet the outstanding balance as outlined within the repayment terms of the agreement; or
- (c) There is any *bona fide* action or inaction by the consumer that adversely and materially affects the lender's security for the loan, or any right of the lender in such security as provided in the loan agreement.

40.06: Prohibited High Cost Home Loan Acts and Practices in Connection with Credit Secured by a Consumer's Dwelling

In connection with the extension of a high cost home loan, it is a deceptive act or practice for a lender, except a lender subject to 209 CMR 40.03, to engage in any of the following:

(1) Home-improvement Contracts. Pay a contractor under a home-improvement contract from the proceeds of a high cost home loan, other than:

- (a) by an instrument payable to the consumer or jointly to the consumer and the contractor; or
- (b) at the election of the consumer, through a third-party escrow agent in accordance with terms established in a written agreement signed by the consumer, the lender, and the contractor prior to the disbursement.

(2) Notice to Assignee.

- (a) Sell or otherwise assign a high cost home loan without furnishing the following statement to the purchaser or assignee: "Notice: This is a mortgage subject to special rules under the Massachusetts Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor."
- (b) A person who purchases or is otherwise assigned to a high cost home loan shall not be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original lender or broker of the loan, provided that the purchaser or assignee demonstrates by a preponderance of the evidence that it:

1. has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit its purchase or acceptance of assignment of any high cost home loans;
2. requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (i) the seller or assignor will not sell or assign any high cost home loans to the purchaser or assignee or (ii) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and
3. exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time after the purchase or assignment of the home loans, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high cost home loans; provided, however, that reasonable due diligence shall provide for sampling and shall not require loan by loan review. If a sampling of the loans purchased or assigned discloses high cost home loans, the purchaser or assignee must conduct a subsequent compliance review to determine whether there are other high cost home loans in the group of home loans purchased or assigned. If high cost home loans are detected within the sample, the purchaser or assignee must take corrective action with all loans identified.

(3) Repayment Ability. Make a high cost home loan unless the lender reasonably believes at the time the loan is consummated that the obligor or the obligors (when considered collectively in the case of multiple obligors) will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current and expected obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan). An obligor shall be presumed to be able to make the scheduled payments to repay the obligation, if, at the time the loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the obligor's scheduled monthly payments, including principal, interest, taxes, insurance, and assessments, combined with the scheduled payments for all other debt, do not exceed 50% of the obligor's documented and verified monthly gross income, if the borrower has sufficient residual income as defined in the guidelines established in 38 CFR 36.4337(e) and VA form 26-6393 to pay essential monthly expenses after paying the scheduled monthly payments and any additional debt.

(4) Counseling Disclosure and List of Counselors. Make a high-cost home mortgage without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development, a housing financing agency of the Commonwealth, the Division of Banks, or the regulatory agency which has jurisdiction over the lender, that the borrower has received counseling on the advisability of the loan transaction. Counseling shall be allowed in whole or in part by telephonic means. At or before closing a high cost home loan, the lender shall obtain evidence that the borrower has completed an approved counseling program.

40.07: Unfair High Cost Home Loan Practices

It is an unfair act or practice for a lender, except a lender subject to 209 CMR 40.03, to engage in any of the following in a high cost home loan:

- (1) Financing of Points, Fees or Charges. Requiring a borrower to directly or indirectly finance

any portion of the points and/or fees nor, in any case, directly or indirectly finance points and fees payable to the lender or charges payable to third parties (other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, voluntary credit, disability, unemployment and/or life insurance, title report and title insurance charges), in an amount that exceeds 5% of the total loan amount or \$800, whichever is greater.

(2) Packing high cost home loans; that is, the practice of selling credit life, accident and health, disability or unemployment insurance products or unrelated goods or services in conjunction with a high cost home loan without the informed consent of the borrower under circumstances where:

- (a) the lender solicits the sale of such insurance, goods or services;
- (b) the lender receives direct or indirect compensation for the sale of such insurance, goods or services; and
- (c) the charges for such insurance, goods or services are prepaid with the proceeds of the loan and financed as part of the principal amount of the loan.

Provided, however, it shall not constitute the practice of "packing" if the lender, at least three business days before the loan is closed, makes a separate oral and a separate clear and conspicuous written disclosure in at least 12 point type to the borrower containing the following information: the cost of the credit insurance or other goods and services; the fact that the insurance, goods, or services will be prepaid and financed at the interest rate provided for in the loan; and that the purchase of such insurance, goods or services is not required to obtain the mortgage loan; provided further, that insurance premiums shall not be considered financed as part of the loan transaction if insurance premiums are calculated, earned and paid on a monthly or other regular, periodic basis.

In addition, the written disclosure shall contain a signed and dated acknowledgment by the obligor(s) that the oral disclosure was made and a signed and dated acknowledgment by the lender that the oral disclosure was made. In addition to the disclosures required under 209 CMR 40.07(2) a creditor shall comply with the requirements of 209 CMR 52.02(1) and (3) as well as 209 CMR 52.03 for credit life insurance or credit accident and health insurance.

(3) Recommending or Encouraging Default or further default by a borrower on an existing loan or other debt, prior to the closing of a high cost home loan that refinances all or any portion of such existing loan or debt.

(4) Advertising. Advertising that refinancing pre-existing debt with a high cost home loan will reduce a borrower's aggregate monthly debt payment without also disclosing, if such are likely the case, that the high cost home loan will increase both

- (a) a borrower's aggregate number of monthly debt payments and
- (b) the aggregate amount paid by a borrower over the term of the high cost mortgage loan.

(5) Unconscionable Rates and Terms.

- (a) Making a high cost home loan with rates or fees that violate 940 CMR 8.06, if applicable, or otherwise charge interest rates or fees in a high cost loan transaction that significantly deviate from industry standards or that are otherwise unconscionable.
- (b) It shall be the lender's burden to demonstrate that interest rates or fees charged are based upon generally accepted credit worthiness, sound underwriting and other risk related standards or otherwise conform to 209 CMR 40.07(5)(a).

(6) Unreasonable Charges. Making high cost home loans in which the lender charges and retains fees paid by the borrower

- (a) for services that are not actually performed, or
- (b) for which the fees bear no reasonable relationship to the value of the services actually performed, or
- (c) which are otherwise unconscionable.

(7) Oppressive Mandatory Arbitration Clause or Waiver of Participation in Class Action Suits. Requiring a borrower, without regard to whether a borrower is acting individually or on behalf of others similarly situated, to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in the Commonwealth where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have.

(8) Failure to Report for Credit Histories. Failing to report both the favorable and unfavorable payment history of the borrower to a nationally recognized consumer credit bureau at least annually if the lender regularly reports information to a credit bureau.

(9) Single-premium Credit Insurance. Notwithstanding the provisions of 209 CMR 40.07(2), making a high cost home loan which contains single-premium credit insurance, including credit life, debt cancellation, and debt suspension.

(10) Modification or Deferral Fees. Making a high cost home loan with any fees to modify, renew, extend, or amend a high cost home loan or defer any payment due under a high cost home loan.

40.08: Bona Fide Errors

It shall not constitute a violation of 209 CMR 40.05 through 40.07, if the lender shows by a preponderance of the evidence that either:

(1) Within 30 days of the loan closing, and prior to the institution of any action under M.G.L. c. 183C, the lender notifies the borrower of the compliance failure and makes appropriate restitution and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either:

- (a) make the high cost home loan satisfy the requirements of M.G.L. c. 183C and 209 CMR 40.00 or
- (b) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high cost home loan; or

(2) the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the errors, and within 60 days after the discovery of the compliance failure and before the institution of any action under M.G.L. c. 183C and 209 CMR 40.00 or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either:

- (a) make the high cost home loan satisfy the requirements of M.G.L. c. 183C and 209 CMR 40.00, or

(b) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high cost home loan.

Examples of a bona fide error may include clerical errors, errors in calculation, computer malfunction and programming, and printing errors. An error in legal judgment with respect to a person's obligation under M.G.L. c. 183C and 209 CMR 40.00 shall not be considered a bona fide error.

40.09: Unfair Credit Practices

It is an unfair act or practice for a lender to violate 12 CFR 27.00.

40.10: Administrative Enforcement

(1) The Commissioner, in his or her discretion, may compromise or settle any claims under any proceeding brought, or to be brought against a lender for a violation of 209 CMR 40.00, if he or she determines that such compromise or settlement is in the public interest.

(2) Nothing in 209 CMR 40.00 shall limit the ability of the Attorney General to enforce the provisions of 209 CMR 40.00, M.G.L. c. 167, ss. 2A through 2G, M.G.L. c. 93A, or M.G.L. c. 183C.

REGULATORY AUTHORITY

209 CMR 40.00: M.G.L. c. 167, § 2A; M.G.L. c. 183C, § 19.